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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1964

No. 574

CHARLES M. DOLEMAN, AS ADMINISTRATOR OF THE ESTATE OF ROBERT R. DOLEMAN,

Petitioner,

vs.

HARRY LEVINE, AN INDIVIDUAL,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF [illegible] AND BRIEF IN SUPPORT THEREOF

[illegible]

INDEX.

Subject Index.

Petition for a Writ of Certiorari:	Page
Statement	2
Questions of law presented	4
Reasons for granting the petition	6
Conclusion	9

Table of Cases Cited.

Ætna Life Ins. Co. v. Moses, 287 U. S. 530	2, 4, 6, 7
Charleston Corp. v. Sinclair, 264 U. S. 543	9
Neubeck v. Lynch, 37 App. D. C. 576	5
Washington Ry. & Electric Co. v. District of Columbia, 56 App. D. C. 134	9

Appendix.

District of Columbia Workmen's Compensation Act:	
Sec. 909	17
914 (m)	17
932 (a)	17
933 (a), (b), (c), (d), (e), (f), (g)	18
Code, D. C., Sec. 1301-1302-1303	20
Sec. 29, Chapter 67, New York Compensation Law	21

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No. 574

CHARLES M. DOLEMAN, ADMINISTRATOR OF THE ESTATE OF ROBERT R. DOLEMAN,

Petitioner,

vs.

HARRY LEVINE, AN INDIVIDUAL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Charles M. Doleman, Administrator of the Estate of Robert R. Doleman, respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in the above entitled cause (Docket No. 6210) entered on November 5, 1934 (R. p. 17), affirming an order and judgment of the Supreme Court of the District of Columbia.

Statement.

This case involves the construction and interpretation of Section 33 (a), (b), (d), (e), (f), and (g) of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, C. 509, 44 Stat. 1424), as applied for purposes of a Workmen's Compensation Act for the District of Columbia (Act of May 17, 1928, C. 612, 45 Stat. 600), and the application of the decision of the Supreme Court of the United States in the case of the

Ætna Life Insurance Co. v. *Moses*, 287 U. S. 530.

The case arises upon an appeal from an order of the Supreme Court of the District of Columbia overruling the demurrer of the petitioner herein to the respondent's plea in abatement and a judgment entered in favor of the respondent upon the petitioner's election to stand upon his demurrer. The parties will be hereinafter designated as plaintiff and defendant.

On January 3, 1933, one Robert R. Doleman, an employee of the Potomac Electric Power Company, while working in a manhole in the street at Lincoln Road and R Street, Northeast, in the District of Columbia, was struck by an automobile owned by Harry Levine and operated by one Harry Barner, sustaining injuries from which he died on the same day. Robert R. Doleman left surviving him his widow, Mary E. Doleman, and his father, Charles M. Doleman, as his dependents and next of kin under the Compensation Act and the death statute.

The widow elected to receive compensation from Robert R. Doleman's employer, the Potomac Electric Power Company, under the Compensation Act. After she filed her claim for compensation, an award was made in her favor by the Deputy Commissioner, and she has been and is now

receiving compensation from the Potomac Electric Power Company.

The father obtained letters of administration on the estate of Robert R. Doleman in the Supreme Court of the District of Columbia. Then the father, both as administrator and dependent of the said deceased employee, filed an election under the Compensation Act to proceed against the third party (Harry Levine), for the wrongful death of Robert R. Doleman.

On November 1, 1933, Charles M. Doleman, as the Administrator of the Estate of Robert R. Doleman, filed a suit in the Supreme Court of the District of Columbia against the defendant. The declaration proceeded to state a cause of action under the death by wrongful act statute, and alleged that the defendant acting by and through an agent, servant, and employee negligently caused the death of Robert R. Doleman, and sought damages in the amount of Ten Thousand Dollars ($10,000) therefor.

Thereafter, on November 13, 1933, the Potomac Electric Power Company (hereinafter referred to as the "employer"), filed a suit in the Supreme Court of the District of Columbia against the defendant. The declaration proceeded to state a cause of action under the death by wrongful act statute assigned to the employer by the provisions of the Compensation Act, and alleged that the defendant, acting by and through an agent, servant, and employee, negligently caused the death of Robert R. Doleman, and sought damages in the sum of Ten Thousand Dollars ($10,000) therefor.

The defendant, Harry Levine, filed in each case a plea in abatement, setting forth in each plea the pendency of the other action, and in the administrator's action alleging that the cause of action was assigned by the terms of the Compensation Act to the employer, and in the employer's action

alleging that by the terms of the death by wrongful act statute such an action should be brought by the administrator. The administrator and the employer, in their respective suits, each filed a demurrer to the plea in abatement. The cases came on for hearing together upon the respective demurrers and were argued and submitted to the court. The court sustained the demurrer to the plea in abatement in the employer's action; and overruled the demurrer to the plea in abatement in the plaintiff's action. The opinion of the Supreme Court of the District of Columbia was published in 62 W. L. R. 77.

An appeal was taken to the United States Court of Appeals for the District of Columbia; the appeal was argued in said court on October 4, 1934; and on the 5th day of November, 1934, the United States Court of Appeals entered judgment affirming the aforesaid judgment of the Supreme Court of the District of Columbia; and rendered an opinion wherein it was held that the action is maintainable only by the employer in accordance with the provisions of Paragraph (b) of Section 933 of the District of Columbia Workmen's Compensation Act (U. S. C. A. Title 33, Chapter 18) (R. p. 12).

Questions of Law Presented.

(1) What is the proper construction of Section 33 (a) of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, C. 509, 44 Stat. 1424) as applied for purposes of a Workmen's Compensation Act for the District of Columbia (Act of May 17, 1928, C. 612, 45 Stat. 600), where one dependent elects both as administrator and dependent to sue third party wrongdoer while the other dependent elects to receive compensation?

(2) What is the proper application of the decision in the case of the *Ætna Life Insurance Co.* v. *Moses*, 287 U. S. 530?

(3) Can the rights vested in dependents who elect not to receive compensation under Section 33 (a) of the said Longshoremen's and Harbor Workers' Compensation Act be nullified by those dependents who elect to receive compensation under the said Act?

(4) Who is the proper party to make the election referred to in Section 33 (a) of the said Longshoremen's and Harbor Workers' Compensation Act?

(5) What are the rights, first, of the person entitled to compensation who elects to sue third party wrongdoer; and, secondly, of the person entitled to compensation who elects to receive said compensation?

(6) What are the rights of the personal representative of the deceased?

(7) Where the employer is given the right to maintain the action against third party wrongdoer, what is the proper distribution of the excess after reimbursement mentioned in Section 33 (e), (2) of said Act? Is this excess distributable among the next of kin or the dependents of the deceased employee?

(8) If the employee maintains the action against the third party wrongdoer, must the declaration set out the next of kin of the deceased as required under the decision of *Neubeck* v. *Lynch*, 37 App. D. C. 576, or must it be confined to dependents under the Compensation Act who may not be next of kin under the death statute?

(9) Has the said Compensation Act repealed the death statute of the District of Columbia, where third party wrongdoer is liable for the death of a deceased employee, so far as the rights of the next of kin of the deceased are concerned?

Reasons for Granting the Petition.

(1) The case here presented is one of great importance and relates to the construction of Section 33 (a), (b), (d), (e), (2), (f) and (g) of the said Longshoremen's and Harbor Workers' Compensation Act. The question which arose upon the plaintiff's demurrer to the defendant's plea in abatement involves procedural and substantive rights going to the very basis of all actions to recover damages for wrongful death where some of the dependents under the Compensation Act elect to sue third party wrongdoer while other dependents elect to receive compensation. It also involves the proper application of the *Ætna Life Insurance Co.* v. *Moses,* 287 U. S. 530. This is unquestionably true in view of the fact that both of the courts below applied the *Ætna* case in their opinions.

(2) The decision of the court below holding that the acceptance of compensation by one dependent transfers the entire cause of action to the employer irrespective of the rights of those dependents who elect to sue third party wrongdoer, not only works a great hardship upon these dependents but is in the very teeth of Section 33 (a) of the said Act. It in substance places the right of election in the hands of the first dependent to accept compensation.

(3) The decision of the lower court misconceives the proper interpretation of Section 33 (a) of the said Act in that it states (R. p. 16): That should the employer be denied the right to maintain the action such employer would be denied his right of reimbursement.

The decision fails to observe that where all of the dependents elect to sue third party wrongdoer under Section 33 (a) of said Act, and recover judgment the employer is denied his right of reimbursement. It also failed to recognize the fact that under the statute of distribution of the

District of Columbia the administrator would be compelled to distribute one half of any recovery to the widow (Section 376, District of Columbia Code) which amount would go to the employer per his assignment.

(4) Grave doubt has arisen in the District of Columbia with respect to the proper application of the case of the *Ætna Life Insurance Co.* v. *Moses,* 287 U. S. 530; and it is respectfully urged that an expression from the Supreme Court of the United States, as to whether or not the said case should be restricted to the facts contained in that case, would dispel all doubts that now exist in this wise.

(5) Confusion will continue to arise in all cases where third party wrongdoer is liable for the death of deceased employee, unless an expression is obtained from the Supreme Court of the United States concerning the following questions:

(A) How should the excess referred to in Section 33 (e) (2) of said Act be distributed after reimbursement?

(a) Should the dependents under the Compensation Act who elect not to receive compensation, be the sole distributees of this excess?

(b) Or should dependents who elect to receive compensation be included as distributees?

(c) Can the next of kin of the deceased share in the excess, if so, to what extent?

(B) If the administrator maintains the action against third party wrongdoer, should the distribution be made to the next of kin or to the dependents of the deceased?

(C) If the action is brought by the employer, should he comply with the death statute which makes it mandatory that only next of kin be alleged as beneficiaries,

or should he defy the death statute and include only those who are dependents within the meaning of the Compensation Act?

It is believed that an expression from the Supreme Court of the United States with regards to the questions raised in this petition would go a long way toward settling much of the confusion that now exists in the District of Columbia, in so far as the rights under the death statute and the Compensation Act are concerned.

(6) Are the rights of next of kin under the death statute to be abrogated where third party wrongdoer is liable for wrongful death of deceased employee?

It was assumed without argument in the *Ætna Life* case (*supra*) by counsel for petitioner and respondent that the Compensation Act transferred the rights of the next of kin under the death statute to the dependents of the deceased employee where a third party is liable in damages for the wrongful death of a deceased employee. Counsel for petitioner in the instant case cannot concur in this admission. On page 541 in the decision of the *Ætna* case (*supra*) the Court said:

> "It is immaterial whether the statutory assignment is said to create a new cause of action in the employer or merely to permit him to enforce that previously vested in the employee or his personal representative. What is material, is, that the employer acquires the legal rights of the employee or the personal representative, subject to the qualifications imposed by the common law or the death statute to the extent that they are not inconsistent with the provisions of the Compensation Act. The Compensation Act permits him to enforce them in his own name."

What do we gather from this expression of the Court? It is reasonable to conclude that the Court took the position

that the employer took the legal rights of the personal representative of the deceased, subject to the qualifications imposed by the common law or death statute, so long as those rights so acquired are not inconsistent with the Compensation Act, but so long as those rights which are sought to be acquired by the employer conflict with the Compensation Act those rights remain the vestages of the common law or the death statute. Section 33 (c) of the Compensation Act states in effect that where there is no one entitled to compensation under the Act, the employer succeeds to all of the rights of the legal representative of the deceased employee to maintain the action, but after the employer has reimbursed himself to the extent of the One Thousand Dollars ($1,000.00) paid in the sinking fund as provided under Section 44 of the Compensation Act, he must turn over the excess recovered to the said personal representative. There is no other provision in the Compensation Act that attempts in any manner to abrogate the rights of the next of kin. The law is well settled on the question that a subsequent statute does not repeal an antecedent statute by implication; see

Washington Ry. & Electric Co. v. *District of Columbia*, 56 App. D. C. 134.

Charleston Corp. v. *Sinclair*, 264 U. S. 543.

WHEREFORE, your petitioner respectfully prays: That a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and sent to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No, 6210, *Charles M. Doleman*, Administrator of the Estate of Robert R. Doleman, v. *Harry Levine*, and that the judgment of the

United States Court of Appeals for the District of Columbia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as may seem meet and just, and your petitioner will ever pray.

CHARLES M. DOLEMAN,
Administrator of the Estate of Robert R. Doleman.
By NATHAN A. DOBBINS,
JAMES C. WATERS, JR.,
OTHO D. BRANSON,
Counsel for Petitioner.

INDEX.

Subject Index.

Brief in Support of Petition for Writ of Certiorari:	Page
Opinions of courts below	1
Jurisdiction	1
Statement	2
Argument	2
Conclusion	16

Table of Cases Cited.

Ætna Life Ins. Co. v. Moses, 287 U. S. 530	13
Betts v. Southern Ry. Co., 71 F. (2d) 787	9
Carpo v. City of Syracuse, 183 N. Y. 395	3
Jannicky, In re, 209 N. Y. 413	5
Neubeck v. Lynch, 37 App. D. C. 576	13
Plumstead Board of Works v. Spackman, L. R. 13, Q. B. D. 878	15, 16
U. S. Fidelity & Guaranty Co. v. Graham & Norton Co., 254 N. Y. 50	7, 15
Zirpola v. Casselman, 237 N. Y. 367	6, 7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 574

CHARLES M. DOLEMAN, ADMINISTRATOR OF THE ESTATE OF ROBERT R. DOLEMAN,

Petitioner,

vs.

HARRY LEVINE, AN INDIVIDUAL.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The memorandum opinion filed in the Supreme Court of the District of Columbia is reported in 62 W. L. R. 77.

The opinion of the United States Court of Appeals for the District of Columbia was rendered November 5, 1934 (R. p. 12), and is not as yet reported.

II.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia was entered on the 5th day of November, 1934.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (C. 231, Sec. 240, 36 Stat. 1157; C. 229, Sec. 1, 43 Stat. 938), and Paragraph (c) of Section 5, of Rule 38 of the United States Supreme Court, 286 U. S. 624.

III.

Statement.

A statement of the facts and the questions involved will be found in the petition for a Writ of Certiorari.

IV.

Argument.

(A) Much of the confusion that has arisen, where third party wrongdoer is responsible for the wrongful death of a deceased employee, is due largely to the fact that the Compensation Act uses in Section 33 (a) of said Act the term "person entitled to compensation."

In the instant case the plaintiff is the administrator of the estate of the deceased employee; and also a person entitled to compensation under the Compensation Act and a next of kin within the meaning of the death statute of the District of Columbia. On the other hand the widow of the deceased employee is a person entitled to compensation under the Act and a next of kin within the meaning of the death statute of the District of Columbia.

The plaintiff elected to recover damages against the defendant; and this election was made in his capacity as the administrator and also in the capacity of a person entitled to compensation. The widow accepted compensation. It is well settled that no cause of action existed against the defendant for his alleged negligence resulting in the death

of the employee except the one given under the death statute. The Code action (Section 1302 of the District of Columbia Code) is given to the representative of the estate of the deceased and not to the widow and next of kin. The cause of action does not accrue until the appointment of an executor or an administrator: See

Carpo v. *City of Syracuse*, 183 N. Y. 395.

It is insisted by the petitioner that the question of "election" should have been disposed of by the deputy compensation commissioner before the award of compensation was made. The adoption of this practice would give assurance of an equitable distribution of the amounts receivable under both statutes. Even though the above practice was not employed in the instant case, the failure so to do on the part of the deputy compensation commissioner does not in the least assuage the position taken by the petitioner in making the election to recover damages against the defendant. It is true that the said Compensation Act is ambiguous; yet, there is sufficient clarity embraced therein to support the petitioner's right to make the said election. Section 33 (a) provides:

> "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person."

Here we have under this section of the said Act two separate and distinct classes of injuries. The first, "if on account of a disability," and the second, "or death." Bearing in mind these two distinct classes of injuries let us

see; do we find their sequences in Section 33 (f) and (g) of said Act? The provisions of the said paragraphs are as follows:

> (f) "If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the commission of his election and institutes proceedings within the period prescribed in section 913 of this chapter, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the commission determines is payable on account of such injury or death over the amount recovered against such third person."
>
> (g) "If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (c) only if such compromise is made with his written approval."

In Section 33 (f) we also have two distinct parties; first, "the person entitled to compensation" and, second, "the representative." In Section 33 (g) we again have two distinct parties; first, "the person entitled to compensation," and, second, "the representative."

What does this suggest? Does it not say in so many words that in case of disability the injured employee has the right of election and in case of death the personal representative of the deceased employee has the right of election. Is it not apparent that the compromise referred to in 33 (g) means that where the employee is injured he is given the right to compromise; but where the injury results in the death of the employee the personal representative is given the right to compromise the action?

Here it must be conceded that the Congress of the United States intended that the personal representative of the de-

ceased employee (administrator) should have the right of election where all of the persons entitled to compensation do not agree to accept compensation. In fairness and justice to all parties concerned, the administrator is the logical person to make the election under the circumstances.

(B) What are the rights of the next of kin of the deceased employee who are not also dependents?

A grave injustice will be dealt a distinct group or class of people in the District of Columbia if the decision of the Court below is to stand. Section 1303 of the District of Columbia Code provides that the amount recoverable against the party liable for the wrongful death of the deceased shall be distributed according to the statute of distribution of the District of Columbia; the decision of the lower Court deprives this class from participating in the proceeds of the estate of the deceased.

The Compensation Act was not designed to destroy vested rights created by the death statute; the Compensation Act created new rights and imposed new obligations unknown to the common law. Under the Compensation Act the class of beneficiaries may be entirely different from that created under the death statute. An illegitimate child of a deceased male employee, under eighteen years of age, may be beneficiary under the Compensation Act; but such child cannot be a next of kin under our statute of distribution. The only reference in the Compensation Act which would indicate the least infringement upon the rights of the next of kin is contained in Section 33 (c) of the said Act which gives the right of action to the employer—provided he pays One Thousand Dollars ($1,000.00) into the sinking fund referred to in Section 44 of the said Act. But, even this section does not make it impossible for such next of kin to share in the distribution. See *In the Matter of Jannicky*, 209 N. Y. 413.

Some of the evils that may be perpetrated if the decision of the lower Court be not reversed are as follows:

(1) Suppose the deceased employee leaves surviving him an illegitimate dependent child, sixteen years of age, and a legitimate child, eighteen years of age; the illegitimate child by accepting compensation transfers the entire cause of action to the employer irrespective of the rights of the legitimate child.

(2) Suppose the deceased employee left surviving him five children by a now deceased wife, varying in ages from eighteen to twenty-seven years of age and also a common law wife. Under the decision of the Court below, the five children would be precluded from sharing in the distribution of their father's estate by wrongful death because when the common law wife accepts compensation, the entire cause of action passes to the employer.

It is most difficult to perceive of a legislative intent bent upon such an inequitable and unjust result.

(C) What are the rights of dependents under the Compensation Act who give notice of their intentions to recover damages against third party wrongdoer?

The question here presented is identical with the question presented to the New York Court of Appeals at the time of the decision in the case of *Zirpola* v. *Casselman*, 237 N. Y. 367, which will be discussed hereinafter. What was the condition confronting dependents under the New York Compensation Act (See appendix, *Infra* pp. c, d), who elected to sue third party wrongdoer while other dependents elected to obtain compensation? The dicta indulged in by the court in the case of *Travelers Insurance Company* v. *Padula Co.*, 224 N. Y. 397, created the impression that the employer was given the right to maintain the action against the third party wrongdoer where any of the dependents

under the Act accepted compensation; but the Court of Appeals of New York in the case of *Zirpola* v. *Casselman*, 237 N. Y. 367, speaking through Mr. Justice Cardozo said, p. 375:

> (1) "If dependents electing to assign are the only next of kin, the entire beneficial interest in the cause of action against the wrongdoer will pass by assignment to the carrier who may sue or compromise at will."
>
> (2) "If dependents electing to assign are members of the class of next of kin, but not all members of that class, their assignment will be affective to the extent of their beneficial interest and no farther, and the carrier, like any other beneficiary must prosecute through the administrator as the statutory trustee, and may compromise or release it."
>
> (3) "If dependents who are next of kin elect not to assign, but retain their cause of action, they retain it with all of the incidents prescribed by the laws of its creation."
>
> (4) "These dependents who are not next of kin and who are, therefore, without beneficial interest in the cause of action against the wrongdoer, are not put to an election since they have nothing to elect."

The above decision lays down a liberal and equitable rule; a rule that guarantees the next of kin as well as dependents who elect not to assign their cause of action, the equal protection of the law. The question arose in New York again in the case of *U. S. Fidelity & Guaranty Co.* v. *Graham & Norton Co.*, 254 N. Y. 50, where the court spoke as follows:

> "Edward Streeter died as a result of an accident arising out and during the course of his employment alleged to be due to the negligence of another not in the same employ. He left a widow and six children. Five of the children were included in the group of dependents under the age of 18, who, with the widow, came

under the protection of the Workmen's Compensation Act (Consol. Law C. 67). The sixth child, although belonging to the group of next of kin, did not come within the group of dependents protected by the Workmen's Compensation Law. The widow and five children, as was their right, elected to accept compensation rather than to pursue the statutory remedy through the appointment of an administrator against the alleged wrongdoer. They received an award which has been paid. The result was an assignment to the insurance carrier of their beneficial interest in such cause of action. The insurance carrier thereupon brought this action in its own name and right against the alleged wrongdoer to recover the interest of the widow and dependent children, only in such a recovery as an administrator might have secured had one been appointed and instituted suit."

Held:

"The authority of the Zirpola case is not impaired by the later decision in the *Staten Island Case* (251 N. Y. 127, 167 N. E. 194). The action should have been brought through an administrator as the statutory trustee of the entire group of beneficiaries. If dependents electing to assign are members of the class of next of kin, but not all of the members of that class, their assignment will be effective to the extent of their beneficial interest and no farther, and the carrier, like any other beneficiary, must prosecute through the administrator as the statutory trustee, and may compromise or release its own interest, but no other."

Not only do the New York cases give the right of action to the administrator where some of the dependents elect to sue third party wrongdoer, but Section 33 (a) of the Longshoremen's and Harbor Workers' Compensation Act expressly reserves this right to dependents who desire to elect to sue third party wrongdoer. The said section provides as follows:

> "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy comissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person."

In the case of *Betts* v. *Southern Ry. Co.*, 71 F. (2d) 787, decided on June 11, 1934, by Justice Parker of the Fourth Circuit, it was held that where the administrator had sued for the wrongful death of an employee by a third party wrongdoer and the widow accepts compensation subsequently, that such acceptance of compensation does not give the employer the right to be substituted as party plaintiff against the third party wrongdoer.

From the above decision it may be seen that the modern trend is for the adoption of the rule laid down by the New York Court of Appeals (237 N. Y. 367, 254 N. Y. 50) hereinbefore discussed in this brief.

It is fundamental that words employed in a statute must be given their plain and ordinary meaning. Section 33 (a) of the Act only transfers to the employer the right of dependents accepting compensation. This section does not transfer the entire cause of action to the employer because if Congress had intended such transfer it would have used the term "all of the rights of the personal representative of the deceased" instead of employing the term "all of the rights of the person entitled to compensation."

This contention is borne out by the usage of the term in Section 33 (c) where we find the following:

> "The payment of such compensation into the fund established in Section 944 of this chapter shall operate as an assignment of all of the rights of the personal representative of the deceased."

It is clear from the very language of the act that Congress intended to reserve to those dependents who elected to sue third party wrongdoer their cause of action. It is inconceivable to think that Congress would guarantee dependents a cause of action and then deny them the right to assert that cause of action. The rule laid down by the New York Court of Appeals giving the administrator the right to maintain the action where all of the dependents do not elect to receive compensation secures to every class of beneficiaries both under the death statute and compensation law the just and equal shares that the law created for them.

(D) The decision of the United States Court of Appeals for the District of Columbia imposes a burden upon dependents, electing not to assign their cause of action to the employer.

It is noted that in the opinion of the United States Court of Appeals for the District of Columbia (R. p. 16) the following proposition of law is laid down:

> "If, therefore, it should be held that, in a case of death, where one beneficiary elects to receive compensation and another not to, the employer's exclusive right to bring the action is lost, the result would be either that the employer's right to reimbursement would be denied or the third party would be subjected to two separate and independent *suits for the same cause* of action."

A casual reading of Section 373 *et seq.* of the statute of distribution of the District of Columbia and the Compensation Act will unearth the fallacy reached in the above conclusion by the court. Upon what proposition of law or reason does the Court below predicate its conclusion with respect to the employer's denial of reimbursement? It must be conceded without argument, that should all of the persons entitled to compensation elect to sue third party

wrongdoer, the employer is not only denied the right of reimbursement, but is also liable to the persons entitled to compensation for any deficiency that exists between the amount of the judgment obtained and the amount the persons entitled to compensation are entitled to receive under the Compensation Act. Now let us assume for the purpose of the argument, that in the case at issue the administrator is given the right to maintain the action against the defendant. How would this affect the right of the employer to reimbursement? Certainly it cannot be argued that Congress intended the employer to be reimbursed as against those dependents who do not assign their cause of action to the employer. Is it not logical and reasonable to conclude that the employer is entitled only to the proportionate share of the dependent who elected to receive compensation? What, then, is the right of such employer and how is he to receive his reimbursement? The plaintiff, as administrator, would be required under the statute of the District of Columbia to make distribution in the following manner: The cost of administration, including a reasonable attorney's fee; then distribute the balance, one-half to the employer per his assignment and one half to himself, since he is also the only next of kin of the deceased; see Sections 376 and 380 of the District of Columbia Code.

However, the argument does not stop here. If we would consider the converse of the proposition, enunciated above, what would be the amount receivable by the plaintiff, should the employer be given the right to maintain the action? Assume that in the event the plaintiff, as administrator, is given the right to maintain the action and he recovers a judgment against the defendant in the amount of Seventy-Five Hundred Dollars ($7500.00). On this basis, if the employer is given the right to maintain the action, your petitioner who elected not to assign his cause of action would receive approximately Four Hundred and Ninety-

Two Dollars ($492.00); while the employer would receive approximately Sixty-Five Hundred Dollars ($6500.00). On the other hand, if the administrator is given the right to maintain the action and recovers judgment against the defendant in the sum of Seventy-Five Hundred Dollars ($7500.00), the employer would receive approximately Twenty-Seven Hundred Dollars ($2700.00) while the administrator would receive an equal amount.

Section 33 (e) (1) (A) (B) and (C) provides as follows:

> (e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise shall be distributed as follows:
>
> (1) The employer shall retain an amount equal to:
>
> (A) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner).
>
> (B) The cost of all benefits actually furnished by him to the employee under section 907 of this chapter.
>
> (C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum, in excess of such compensation, to the person entitled to compensation or to the representative; and—

It is because of the hardship which the reimbursements, mentioned in the above section, would work upon those dependents who elected not to assign their cause of action, that we insist Congress could not have intended to give the right of action to the employer in the instant case.

> (E) Should the employer maintain the action against third party in the instant case? What should be the proper distribution of the excess after reimburement?

Section 33 (2) of the said Compensation Act provides:

> "The employer shall pay any excess to the person entitled to compensation or to the representative."

It is to be observed that this section does not provide whether the person entitled to compensation or the representative shall distribute the excess received by him to the next of kin, or dependents who elected not to assign or whether such excess is to be retained by him. Naturally the question arises with respect to what is the proper distribution of the excess referred to in Section 33 (2) of the said Act.

If the person entitled to compensation is to make the distribution according to the statute of distribution in the District of Columbia, he cannot make said distribution as such, but must qualify as administrator before said distribution can be made. If the personal representative is to make the distribution; to whom should he make such distribution? Under the statute of the District of Columbia he is limited in making distribution to the next of kin of the deceased.

In considering the right of the employer to maintain the action against third party, we cannot overlook the question as to how should the declaration be drawn. The decision of the United States Court of Appeals for the District of Columbia in *Newbeck* v. *Lynch*, 37 App. D. C. 576, holds that in an action for wrongful death the next of kin of the deceased must be named in the declaration. Should the dependents who assign their cause of action to the employer be not also next of kin of the deceased? Grave doubt must arise as to how the action could be maintained by the employer since the said Compensation Act fails to provide the mode of procedure where the employer sues the third party wrongdoer.

(F) The United States Court of Appeals erred in its application of the *Ætna Life Case*, 287 U. S. 530.

The facts in the *Ætna Life* case (*supra*) differ materially from the facts in the case at isue. In the *Ætna Life* case the widow was the only person entitled to compensation and the administratrix of the estate of the deceased. Under such circumstances there could be no question concerning her right to transfer the entire cause of action to the employer. This conclusion was also reached in the case of *Travelers Ins. Co.* v. *Padula Co.* 224 N. Y. 397. Mr. Justice Stone speaking in the *Ætna Life* case (*supra*), pages 538, 539 said,

> "The election to accept compensation was made by the widow *as she is both the administratrix and the only person entitled to compensation*, the election was validly exercised and we need not resolve possible doubts as to the proper person to make the election under other circumstances."

The very language used by the learned Justice from the very outset clearly shows that the *Ætna Life* case (*supra*) must be limited to the facts contained in that case. The facts in the present case however show that the plaintiff is the administrator of the estate of the deceased; that he is a dependent under the Compensation Act who elected to sue third party wrongdoer; and that he is a next of kin within the meaning of the District of Columbia death statute; while the widow is a dependent under the Compensation Act and a next of kin within the meaning of the death statute of the District of Columbia.

On page 540 of the said case the United States Supreme Court observed that the administrator was not the only person who may maintain the action and said further that where the employer is given anything to recover, it is the entire recovery provided by the wrongful death act. It is this part of the decision in the *Ætna* case (*supra*) that led both of the Courts below to the decision that they reached.

The effect of this part of the decision must be considered

in the light of the facts before the Court at that time. It is unreasonable to assume that the Supreme Court of the United States would predicate an opinion covering more than the points that were actually before the Court at the time of the decision. Our belief in this wise is strengthened by that portion of the Court's opinion on page 543 where the Court said,

> "Nor do we consider what would be the rights of the person entitled to compensation or the personal representative of the deceased."

And at this point the Court referred to the case of *U. S. Fidelity & Guaranty Co.* v. *Graham & Norton Co.*, 254 N. Y. 54-55, cited hereinbefore. Is it not significant that the Court made reference to pages 54 and 55 of the New York case (*supra*)? A reading of the case on the pages referred to by the Court reveals that where there are dependents or next of kin, who do not assign their cause of action; the administrator is the proper party plaintiff to maintain the action.

Much wisdom is embraced in the opinion written by Mr. Justice Cardozo in the *Zirpola* v. *Casselman* case (*supra*). and the opinion of Mr. Justice Pound in the *U. S. Fidelity and Guaranty Co.* v. *Graham & Norton Co.* case (*supra*), to say the least of the most recent opinion of Mr. Justice Parker of the Fourth Federal Circuit in *Betts* v. *Southern Ry. Co.* (*supra*). Juristic thought has long since agreed that before a court should give such an interpretation to a statute that works a hardship upon a particular class or group; it ought to struggle with all of the intellect that it possesses and with all of the vigor of mind that it has against such an interpretation of such statute; and unless the court is forced to come to a contrary conclusion it ought to assume that it is impossible that the legislature could have so intended. The substance of the above expression was laid down in *Plumstead Board of Works* v. *Spackman*, L. R. 13 Q. B. D.,

878; and received the approval of the Supreme Court of the United States in *Sorrell* v. *United States*, 287 U. S. 435.

In view of the highly important part the case of the *Ætna Life Insurance Co.* v. *Moses* (*supra*), played in influencing the opinions of both of the lower Courts; it is believed that an additional expression from the Supreme Court of the United States with respect to the exact scope of the said *Ætna* case is almost imperative.

Conclusion.

Under a practical application of the Compensation Act and in the light of the cases cited, it is submitted that the administrator has the right to maintain the action under the facts disclosed in the instant case, a Writ of Certiorari should be granted, and this Court should review the decision of the United States Court of Appeals for the District of Columbia, and finally reverse it.

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Counsel for Petitioner.

APPENDIX.

DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT, U. S. C. A. TITLE 33, CHAPTER 18.

Section 909. *Compensation for Death:*

"If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $200.

(b) If there be a surviving wife * * * and no child of the deceased under the age of eighteen years, to such wife * * * 35 per centum of the average wages of the deceased, during widowhood, * * * with two years compensation in one sum upon remarriage;"

Section 914. *Payment of Compensation:*

(m) "The total compensation payable under this chapter for injury or death shall in no event exceed the sum of $7,500."

Section 917. *Compensation a Lien Against Assets:*

"Compensation shall have the same preference of lien against the assets of the carrier or employer without limit of amount as is now or may hereafter be allowed by law to the claimant for unpaid wages or otherwise." * * *

Section 932. *Security for Compensation:*

(a) "Every employer shall secure the payment of compensation under this chapter—

(1) "By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund * * *."

Section 933. *Compensation for Injuries Where Third Persons are Liable:*

(a) "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person."

(b) "Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election."

(c) "The payment of such compensation into the fund established in section 944 of this chapter shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as 'representative') to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election."

(d) "Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceedings."

(e) "Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner).

(B) The cost of all benefits actually furnished by him to the employee under section 907 of this chapter.

(C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum, in excess of such compensation, to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) "If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the commission of his election and institutes proceedings within the period prescribed in section 913 of this chapter, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the commission determines is payable on account of such injury or death over the amount recovered against third person."

(g) "If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval."

CODE OF LAW FOR THE DISTRICT OF COLUMBIA.

Chapter Forty-five,

Negligence Causing Death

Section 1301. *Liability*—

"Whenever by an injury done or happening within the limits of the District of Columbia the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured, * * * to maintain an action and recover damages, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured, * * *; and such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the widow and next of kin of such deceased person: *Provided*, That in no case shall the recovery under this act exceed the sum of ten thousand dollars * * *."

Section 1302. *By Whom Suit to be Brought*—

"Every *such* action shall be brought by and in the name of the personal representative of such deceased person, and within one year after the death of the party injured."

Section 1303. *Distribution of Damages*—

"The damages recovered in such action shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall inure to the benefit of his or her family and be distributed according to the provisions of the statute of distribution in force in the said District of Columbia."

New York Compensation Law.

Section 29, Chapter 67.

"If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ such injured employee, or in case of death, his dependents, shall before any suit or any award under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commissioner may by regulation prescribe. If such injured person, or in case of death, his dependents, elect to take compensation under this chapter, the awarding of compensation shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation, and if he elects to proceed against such other, the state insurance fund, person, association, or corporation, or insurance carrier as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected and the compensation provided or estimated by this chapter for such case. In case of payment of an award in accordance with subdivision 9 and 10 of section 15, such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with a reasonable funeral expense and the expense of medical treatments, which shall be in addition to any cause of action by the legal representative of the deceased. Such a cause of action assigned to the State may be prosecuted or compromised by the commissioner.

A compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for by this chapter shall be

made only with the written approval of the commissioner, if the deficiency of compensation would be payable from the State insurance fund, and otherwise with the written approval of the person, association, corporation, or insurance carrier liable to pay the same. Wherever an employee is killed by the negligence or wrong of another not in the same employ and the dependents of such employee entitled to compensation under this chapter are minors, such election to take compensation and the assignment of the cause of action against such other and such notice of election to pursue a remedy against such other shall be made by such minor, or shall be made on behalf of such minor by a parent of such minor, or by his or her duly appointed guardian as the board may determine in each case.